IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 107

HAZEL PALMER, et al.,
Petitioners,

v.

ALLEN C. THOMPSON, Mayor, City of Jackson, et al.,
Respondents.

REPLY BRIEF FOR PETITIONERS

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It is not the intent of this Reply Brief to analyze on a case by case basis the legal arguments of Respondents. Respondents have boldly restated the philosophy of cases long ago discredited by this Court. They have sought to limit the Thirteenth Amendment to its historical role of abolition of slavery, rather than to carry out its historical promise in proclaiming freedom for an enslaved race. They view the Fourteenth Amendment as directing the equality of physical treatment but permitting organized government to proclaim, by its actions, the universal inferiority of black people. And, lurking behind Respondents' arguments is the hope that this Court will return to the legalisms of "black inferiority" as developed in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) and reaffirmed in *Plessy v. Ferguson*, 163 U.S. 537 (1896).

Fourteenth Amendment:

Respondents argue that to establish a denial of equal protection under the Fourteenth Amendment, it is necessary for Petitioners to prove two elements: (1) that the state's action resulted in difference of treatment between the whites and blacks, *and* (2) that this difference resulted from an intent to discriminate against blacks:

> "Before there is a denial of equal protection of the laws under the Fourteenth Amendment, there must be (1) a difference in treatment of different citizens, *and* (2) a difference motivated by an intent and purpose to discriminate on account of race, i.e., an invidious discrimination. Before the second requirement comes into play, there must be a 'difference' or inequality, not present here. *Motive is therefore irrelevant.*" (Emphasis added.)
>
> Respondents' Brief, p. 24.

On the basis of this argument, Respondents contend that, because the closing of the pools does not result in difference of treatment between whites and blacks (neither race can use the pools), Petitioners have failed to prove the first element; therefore, they argue that the City's "motive is irrelevant."

Petitioners deny that the closing of the pools did not constitute a difference in treatment of blacks.[1] However,

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[1] The assumption underlying Respondents' argument i.e. that the closing of all public pools will then allow members of each race equal opportunity to obtain private pool facilities, is unreal. It assumes that blacks and whites possess the economic equality which alone can make private freedom of opportunity meaningful. The economic status of blacks, particularly in the South, is substantially lower than whites. In the South, the median income of a black family is only half that of a white family. *The Social and Economic Status of Negroes in the United States*, 1969, B/S Report No. 375—Current Population Reports Series P. 23, No. 29 (U.S. Dept. of Labor—U.S. Dept. of Commerce), p. VIII.

the contention that racially motivated state action can be constitutionally disregarded in the absence of a finding of discriminatory treatment, is in essence simply a euphemism for the rationale which underlies the "now thoroughly discredited doctrine of 'separate but equal'" (*Watson v. City of Memphis*, 373 U.S. 526, 538 (1963)): which rationale was stated by the *Plessy* majority to be:

> "Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other" (at page 544).

Plessy held that, so long as public facilities were made available by the state to blacks and whites on an equal basis, the fact that the state's intent was to keep the races separate was irrelevant since no inference of inferiority could be drawn thereby. This parallels Respondents' argument here that, so long as both races have been equally deprived of the use of public pools, it is immaterial that the City of Jackson intended to prevent the use of public pools on an integrated basis. The majority's position in *Plessy* was answered by Justice Harlan in his dissent with this biting question:

> "What can more certainly arouse race hate, what more can certainly create and perpetuate a feeling of distrust between these races, that state enactments which in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?" (at p. 561).

And it is appropriate to paraphrase here: What can continue to arouse racial hate and distrust more than such actions as the Respondents' acknowledged intent to close its pools rather than permit blacks and white to swim to-

gether? If Justice Harlan's question can be said to be answered by Respondents' argument—that the intent is irrelevant so long as both races are equally banned—then the spirit of *Plessy* still lives.

But the *Plessy* assumptions and rationale were interred by *Brown v. School Board*, 347 U.S. 483 (1954), in language echoing Justice Harlan:

> "To separate (black children) from others of similar age and qualifications solely because of their race generates feelings of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone" (at p. 494).

Respondents also seek to justify their actions by the argument that integrating the pools would produce violence, and point to the recent racial conflict in this country to support this claim. Respondents, however, refuse to recognize that the only peace established during 100 years of segregation was that imposed upon blacks by the force and repression of the dominant white society; and that it is long-suffered repression, not freedom and equality, which inevitably leads to violent upheaval. With this Court's decision in *Brown*, the nation has taken the road to integration and equality, rather than segregation and repression, as the proper constitutional direction to ultimate racial peace. This historical truth that racism leads to violence was emphasized by the *Kerner Commission:*

> "Despite these complexities, certain fundamental matters are clear. Of these, the most fundamental is the racial attitude and behavior of white Americans towards black Americans. Race prejudice has shaped our race history in the past; it now threatens to do so again. *White racism is essentially responsible for the explosive mixture which has been ac-*

cumulating in our cities since the end of World War II." (Emphasis added.)

Report of the National Advisory Commission on Civil Disorders, (Kerner Commission), "The Basic Causes", part II, Chapter 4 at 203 (Bantam Books—1968).

See also: *National Commission on the Causes and Prevention of Violence—To Establish Justice, to Ensure Domestic Tranquility,* (Eisenhower Commission), pps. XXI, 10, 15, 111-121, (Award Books—1969).

The integrating of public pools in Jackson will not end racial strife in Mississippi or elsewhere. But if the City of Jackson is successful in devising a legal technique for closing rather than integrating its pools, it will represent another indication that "our nation is moving towards two societies, one black, one white—separate and unequal." *Kerner Commission, supra,* at pg. 1.

Respondents raise a second point with respect to the applicability of the Fourteenth Amendment. In order to escape the otherwise clear implication of *Griffin v. County School Board,* 377 U.S. 218 (1964) which held that a county could not close its schools in order to avoid integration, they assert the proposition that, in relation to government, the operation of a public school is a "basic function" and carries out "a basic public responsibility" (Respondents' Brief, p. 37), whereas the operation of a swimming pool is only "the exercise of the discretionary proprietary power"(Respondents' Brief, p. 30). By virtue of this asserted distinction between basic function and proprietary power, Respondents draw the conclusion that "by a decision to no longer provide such facilities as swimming pools, no

one is deprived of any constitutional right" (Respondents' Brief, p. 37).

The majority opinion below makes a somewhat similar and equally nebulous distinction between an "essential" and non-essential "public function" (App. p. 38). But, significantly, no authority is cited either by Respondents or the majority opinion below to support this position. This distinction is reminiscent of a similar legal fiction which was developed in *Plessy*, namely a distinction between "legal" and "social" rights—a fiction which had the effect of molding race relations in this country into a pattern of segregation for almost 100 years.[2]

One needs very little foresight to visualize the morass which would be created if the distinction between essential and non-essential activities, determined whether black people are entitled to the protection of the Fourteenth Amendment.

For example, assuming that a school is "essential", are any of the following facilities or classes "non-essential"—gymnasium, auditorium, art, social studies? If a state kept its schools open, but closed all its included swimming pools or swimming classes to avoid integration, what would be the constitutional significance of its action?

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[2] The distinction between essential and non-essential rights is in the same category as the distinction between "privileges" and "rights" which long continued to plague and obscure the search for the application of constitutional principles until this Court's decisions in *Shapiro v. Thompson*, 394 U.S. 618, 627 f.n. 6 (1969) and *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

For a black child to be told that he cannot swim in a public pool with the same white friend with whom he attends public school because the former is non-essential while the latter is essential, can make little sense to him except as it makes clear to both that he is considered inferior.[3]

Thirteenth Amendment:

In keeping with the *Plessy* doctrine, Respondents assert that "the Thirteenth Amendment literally merely abolished the 'institution' of slavery" (Respondents' Brief, p. 13).[4] However, the overriding purpose of the Thirteenth Amendment was to provide "universal freedom" for black people:

> "No one can fail to be impressed with one pervading purpose found in all the amendments, laying at the foundation of each, and without which none of them would have been suggested; *we mean freedom of the slave race,* the security and firm establishment of that freedom and the protection of the newly-made freeman and citizen from oppression of those who formerly exercised unlimited dominion over them." (Emphasis added.)
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> *Slaughter House Cases,* 16 Wall. 36, 71 (83 U.S. XXI 394) 1872.

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[3] In *New Orleans City Park Improvement Association v. Detiege,* 252 F.2d 122 (5 C.C.A.—1958); aff'd 358 U.S. 54 (1958), the New Orleans City Park Improvement Association argued that a summary judgment requiring integration of park facilities was erroneously granted because the trial court had incorrectly acted, without taking evidence, on the assumption that the "psychological" effect of school segregation found to exist in *Brown,* also applied to segregated parks. The Court summarily rejected the argument.

[4] This Court has rejected the argument, first expounded in *Hodges v. United States,* 203 U.S. 1 (1906) to the effect that the Thirteenth Amendment merely abolished slavery. *Jones v. Alred H. Mayer Co.,* 392 U.S. 409, 441, f.n. 78 (1968).

> "The Thirteenth Amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institution of slavery . . . but it prevents the imposition of any burdens of disabilities that constitute badges of slavery or servitude. *It decreed universal freedom in this country.*" (Emphasis added.)
>
> *Plessy v. Ferguson,* at p. 555 (Harlan, dissenting).

To urge, as Respondents do, that this case merely involves the desire of a few people to swim in public pools, reflects the blurred perception of a white power structure yet unwilling to accept black peoples' status as free men. It is not the right to swim but the right to be free, and to be treated as free men, which is at issue in this case—a right which is not a mere "paper guarantee." *Jones, supra,* at 443.

But, if the right to be free has any meaning for black people, it must guarantee that black people have a right to integrated facilities, a right to unfettered access to courts for the purpose of obtaining integrated facilities, a right to have public pools re-opened when their closure occurred as a result of a court order integrating those facilities. Anything less is not freedom.

Respondents' Actions Violate Section 1981

Respondents argue that there is an absence of proof that they closed the public pools to punish black citizens for succeeding in their lawsuit to enjoin segregation of the pools. The facts of this case and the historical evidence demonstrate that Respondents' purpose has been to prevent blacks from achieving integration and to circumvent each legal victory with yet another scheme designed to frustrate and avoid each integration order.

However, even if the City of Jackson's intent was not to punish black people for their legal success in *Clark v.*

Thompson, 205 F. Supp. 359, aff'd. 313 F.2d 637 (1963), the closing of the pools in fact accomplished this purpose by denying them the use of any pool, solely because they successfully exercised their federal statutory right to seek relief in courts under the Civil Rights Act of 1970, 42 U.S.C. §1981.

Only recently, in *Nash v. Florida Industrial Commission,* 389 U.S. 235 (1967), this Court invalidated an application of the Florida Unemployment Compensation law because it discouraged employees from seeking access to the National Labor Relations Board. The Florida law on its face did not hinder access, nor was there any showing that Florida intended to frustrate the federal policy of access to the Board. Nevertheless, this Court struck down the application of the law which denied unemployment benefits to those who filed unfair labor charges with the Board because its *effect* was to frustrate enforcement of a federal statute and was thus invalid under the Supremacy clause.

> "The action of Florida here, like the coercive actions which employers and unions are forbidden to engage in has a direct tendency to frustrate the purpose of congress to leave people free to make charges of unfair labor practices to the Board" (at p. 239).

c.f *Hill v. State of Florida,* 325 U.S. 538 (1945).

In the instant case, Section 1981 was adopted to give black people the right to vindicate their civil rights by bringing suits in courts of law. The Respondents are prohibited from acting so as to frustrate that right. Respondents, by closing their public pools, have, intentionally or not, taught blacks the lesson that if they go to court to vindicate their civil rights, they will end up with less than they had before. To permit the state to accomplish this object in this manner

would frustrate the effectiveness of Section 1981 in an area of race relations where Congress had clearly intended that the courts would provide legal protection.

CONCLUSION

The judgment below should be reversed and the district court directed to issue a permanent injunction requiring respondents or their successors in officer to operate the municipal swimming and wading facilities of the City of Jackson on an integrated basis.

Respectfully submitted,

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